No. 14254.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,
Appellant,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation,
Appellee.

PETITION FOR REHEARING AND STAY OF MANDATE.

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TABLE OF AUTHORITIES CITED

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COMES NOW the Appellee, Hartford Accident & Indemnity Company, a corporation, and respectfully requests a rehearing of the above entitled matter upon the following grounds:

This case was brought in the Federal Court because of the diversity of the citizenship of the parties involved and thus, the District Court was given jurisdiction and at the same time is bound to follow the decisions and laws of the state where the action arose, to wit: California, under the United States Supreme Court decision of *Erie v. Tompkins,* 304 U. S. 64. This present decision, we

respectfully urge, overrules much settled law and many decisions of the California courts.

Certain phases of the decision are sufficient to require rehearing and would change the decision to affirmance of the lower court and it does not seem expedient to cite the multitude of decisions involved, as we believe the principles are well established under California law and decisions.

The main points of this decision which we respectfully urge are entirely contrary to California law and which are decisive in this case are conclusions:

(1) That Neil Co. is not a joint tort-feasor with its employees—the driver and flagman of the truck. (The Supreme Court of California holds differently in many cases as set forth on page 20 of Appellee's brief—*McInerney v. The United Railroads,* 50 Cal. App. 538, 195 Pac. 958, and *Benson v. Southern Pacific,* 177 Cal. 777, 171 Pac. 948.)

(2) That in a suit between Neil Co. as a plaintiff (or Pacific Employers Insurance Company under its subrogation) against the driver and flagman, because of loss due to their negligence, said employees could not urge that Neil Co. was contributorily negligent in its operation in respect to the unloading of the truck in question because the Neil Co. would not be responsible for its supervisorial employee's negligence, excepting under the doctrine of *respondeat superior* (in other words, in all cases where the employer subrogates against a negligent employee the defense of contributory negligence, arising upon negli-

gence of other employees, is wiped out unless it was an act directed by the officers of the company or principal expressly.

(3) That even though the California Statute of Limitations for torts had passed on January 27, 1952, and the California Statute of Limitations for implied contracts had passed on January 27, 1953 (Op. p. 13) and Findings and Judgments were signed January 5, 1954, and no action had been started by Pacific Employers Insurance Company or Neil Company, at the latter date, still such said California Statutes for decisions have no effect, but a decision from Ohio is binding. (The law of California in the case of *Automobile Insurance Company of Hartford, Conn. v. Union Oil Company,* 85 Cal. App. 2d 302, is applicable and not the law of Ohio as stated in the opinion on page 13.)

(4) That even though three decisions of the California Appellate Court and approved by its Supreme Court, that the law of primary and secondary insurance does not apply in California and in the latest decision of *Traders General Insurance Company v. Pacific Employers Insurance Company,* 130 Cal. App. 2d 158, holds the same and a petition for hearing in that case was denied by the State Supreme Court, this Court does not have to follow same. (The *Traders'* case was decided after the *United Pacific, Canadian Indemnity Company* and *Maryland Casualty Company* cases, thus, showing California courts intent to maintain their own sovereign law.)

(5) It is further urged that the Trial Courts' findings of fact were substantially supported by evidence as to the Neil Co. being liable not solely on the doctrine of *respondeat superior,* and thus, this Honorable Appellate Court is required to follow the factual findings and draw every favorable inference in favor of appellee. (*Hunter v. Shell Oil Co.,* 198 F. 2d 485; *Insurance Co. of North America v. Board of Education of Independent School District No. 12,* 196 F. 2d 901.)

Wherefore, Appellee respectfully prays that this Honorble Court rehear the matter and that a mandate of the Court be ordered stayed until the final determination of this rehearing.

Respectfully submitted,

James V. Brewer,

Attorney for Appellee.

Certificate of James V. Brewer.

State of California, County of Los Angeles—ss.

Comes now, James V. Brewer, being first duly sworn, deposes and says:

That he is the attorney for the appellee in the above entitled action and that in affiant's judgment the Petition for Rehearing is well founded and is not interposed for the purpose of delay.

JAMES V. BREWER.

Subscribed and sworn to before me this 14th day of December, 1955.

ANN THOMAS,
Notary Public in and for said County and State.